

TENNESSEE GENERAL ASSEMBLY
FISCAL REVIEW COMMITTEE



FISCAL NOTE

HB 2428 - SB 2272

February 29, 2016

SUMMARY OF BILL: Creates the Forfeiture Act (the Act) to apply to all seizures and forfeitures occurring after July 1, 2016. The Act is intended to transition Tennessee from a civil forfeiture procedure to a criminal forfeiture procedure.

The Act authorizes the forfeiture of a person's property if (1) the person was arrested for an offense to which forfeiture applies, (2) the person is convicted in a court of competent jurisdiction of a criminal offense for which forfeiture is applicable, and (3) the state establishes by clear and convincing evidence that the property is subject to forfeiture.

The Act authorizes a court to order a person to forfeit property acquired through commission of an offense, property directly traceable to property acquired through the commission of an offense, and any instrumentality the person used in the commission of an offense.

The Act authorizes law enforcement agencies to seize property subject to forfeiture prior to a conviction, but the property must be held until a forfeiture proceeding has been conducted. Forfeiture proceedings are ancillary to criminal prosecutions and do not begin until the criminal prosecution has concluded.

The Act establishes procedures for a person to protest the forfeiture.

The Act requires all forfeited currency, all sale proceeds from the sale of forfeited or abandoned property, and all proceeds from the sale of forfeited property received by the state from another jurisdiction to be deposited in the state General Fund.

The Act requires all law enforcement agencies, state and local, to prepare an annual report of the total number of seizures of currency and the total amount of currency seized in each seizure, the total number of seizures of property and the number and types of items seized in each seizure, the market value of each item of property seized, and the total number of occurrences of each class of crime that resulted in the agency's seizure of property. A law enforcement agency must note in its report if it did not engage in seizure or forfeiture pursuant to the Act or federal forfeiture law. The annual report must be transmitted to the Department of Safety (Safety) and the District Attorney General of the agency's district. Safety must compile the reports and publish the aggregate report on its website by April 1 of each year.

The Act prohibits a law enforcement agency from directly or indirectly transferring seized property to a federal law enforcement authority or other federal agency unless the value of the seized property exceeds \$50,000, the law enforcement agency determines that the criminal

conduct that gave rise to the seizure is interstate in nature and sufficiently complex to justify the transfer of the property, or the seized property may only be forfeited under federal law.

The Act requires all proceeds returned to a law enforcement agency by the United States Attorney General through the Department of Justice's Asset Forfeiture Program to be deposited into the General Fund.

ESTIMATED FISCAL IMPACT:

**Decrease State Revenue – \$2,071,300/State Law Enforcement Agencies
\$648,500/Division of Administrative Procedures**

Increase State Revenue – \$828,500/General Fund

Decrease State Expenditures – \$648,500

Decrease Local Revenue – \$4,418,900

Assumptions:

Civil Forfeiture and the Equitable Sharing Program

- Civil forfeiture is a legal process in which law enforcement agencies seize assets suspected of being involved in criminal or illegal activity. Civil forfeiture may be initiated even if the property owner has not been charged with any criminal or illegal activity.
- Civil forfeiture actions are in rem, i.e., they are actions brought against property or a property interest and not against an individual. *Stuart v. State Dept. of Safety*, 963 S.W.2d 28, 34 (Tenn. 1998).
- Under current procedure, a law enforcement agency may seize property for which probable cause exists that the property was used or involved in criminal or illegal activity. The law enforcement agency files a civil forfeiture action. The property owner then has the burden to prove that the property was not involved in the commission of the offense.
- When the law enforcement agency is a state entity, e.g., the Tennessee Bureau of Investigation (TBI), Safety, and the Tennessee Alcoholic Beverage Commission (ABC), the forfeiture action is filed with the Secretary of State's Division of Administrative Procedures (Administrative Procedures).
- Administrative Procedures bills state entities as follows:
 - The law enforcement agency is charged a \$200 docketing fee for each matter placed on Administrative Procedures' dockets. The first two hours of judicial work are drawn against this fee.
 - Any additional judicial time is billed at a rate of \$200 per hour.
- A law enforcement agency may also transfer the property to the federal government, which may institute forfeiture proceedings under the federal procedures. The monies

from these federal proceedings are deposited into the Assets Forfeiture Fund of the Department of Justice (DOJ) established by the Comprehensive Crime Control Act of 1984, 98 Stat. 1837 (1984). These funds are distributed to state and local law enforcement agencies by the Attorney General [21 U.S.C. § 881(e)(1)(A) and (e)(3), 18 U.S.C. § 981(e)(2), and 19 U.S.C. § 1616a] through the Equitable Sharing Program.

- The intent of the federal program is to assure that the property transferred to a state or local law enforcement agency has a value that bears a reasonable relationship to the degree of direct participation of the state or local agency and to “encourage further cooperation between the recipient state or local agency and Federal law enforcement agencies”. 21 U.S.C. § 881(e)(3); *see* Department of Justice, Criminal Division, *Guide to Equitable Sharing for State and Local Law Enforcement Agencies* 1 (2009).
- The Act could substantially impact Tennessee’s participation in the Equitable Sharing Program.
- First, the Act requires all proceeds from forfeitures, including those received from the Equitable Sharing Program, to be deposited in the General Fund. Federal law does not require the forfeiture proceeds to be used for law enforcement purposes. However, a Department of Justice (DOJ) policy does require the proceeds to be used for law enforcement purposes.
- The Act could result in the DOJ prohibiting Tennessee law enforcement agencies from participating in the Equitable Sharing Program.
- Second, the Act limits property that can be transferred to a federal law enforcement authority to property worth more than \$50,000. This will substantially limit law enforcement agencies’ participation in the Equitable Sharing Program as there will not likely be a significant number of seized properties that are worth more than \$50,000.
- Notwithstanding the provisions’ potential impact on participation in the Equitable Sharing Program, the issue is currently moot because the DOJ has suspended the Equitable Sharing Program.
- The Act changes the state’s current procedure in three significant ways:
 - It requires a conviction or guilty plea before seized property can be forfeited;
 - It prohibits state and local law enforcement agencies from transferring seized property to a federal law enforcement agency except in limited situations; and
 - It requires forfeiture actions to be filed in the court having venue for the related criminal matter.

Requiring a Conviction and Limiting Transfer to Federal Law Enforcement

- Requiring a conviction before property to be forfeited will result in less property being forfeited. Property can currently be forfeited even if the owner of the property was not charged with any criminal conduct. Requiring a conviction will result in only property belonging to a criminal defendant being subject to forfeiture.
- From 2010 to 2014, state law enforcement agencies have received approximately \$994,222 each year in payments from the Equitable Sharing Program, and local law enforcement agencies and drug task forces received approximately \$4,418,943 each year in payments from the Equitable Sharing Program.
- Over that same period, federal law enforcement agencies retained approximately 52 percent of the money deposited into the Assets Forfeiture Fund. It is assumed that state and local law enforcement agencies and drug task forces seize approximately

\$11,277,427.08 in currency and property each year $\{[(\$994,222 + \$4,418,943) / 48] \times 100\}$, of which \$2,071,295.83 is seized by state law enforcement and \$9,206,131.25 is seized by local law enforcement and drug task forces.

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- The Act could result in the DOJ prohibiting Tennessee law enforcement agencies from participating in the Equitable Sharing Program.
- Second, the Act limits property that can be transferred to a federal law enforcement authority to property worth more than \$50,000. This will substantially limit law enforcement agencies' participation in the Equitable Sharing Program as there will not likely be a significant number of seized properties that are worth more than \$50,000.
- Notwithstanding the provisions' potential impact on participation in the Equitable Sharing Program, the issue is currently moot because the DOJ has suspended the Equitable Sharing Program.
- It is assumed that 40 percent of current forfeiture actions result in the owner being convicted of a crime. Thus, the Act will reduce forfeiture revenue by 60 percent.
- It is assumed that \$2,071,295.83 of currency and property forfeited each year to state law enforcement agencies will decrease to \$828,518.33 ($\$2,071,295.83 \times 0.4$), but the decrease in revenue to state law enforcement will be \$2,071,295.83 as a result of the Act.
- The Act requires all forfeiture proceeds to be deposited in the General Fund. Thus, the estimated \$828,518.33 in property that will still be subject to forfeiture under the Act will go to the General Fund and be realized as a recurring increase in state revenue.
- It is assumed that most local law enforcement agencies do not have the resources to prosecute forfeiture actions or a sufficient number of forfeiture actions to justify hiring personnel to prosecute the actions.
- It is assumed that all local law enforcement agencies transfer their seized property to a federal law enforcement agency.
- The Act requires all forfeiture proceeds, even those from the efforts of local law enforcement, to be deposited in the state General Fund. It is assumed that local law enforcement agencies will not hire personnel to prosecute these matters because they will not receive any of the proceeds.
- It is assumed that local forfeiture revenues will all but cease.
- The Act will result in a recurring decrease in local revenue of \$4,418,943.

Requiring Forfeiture Actions in Court Having Venue for Criminal Matter

- The Secretary of State has billed the Department of Safety approximately \$648,450 each year in the past three years. The Secretary of State reports that it would decrease its expenditures by the same amount of revenue lost by the Act.
- The Secretary of State would reduce its recurring expenditures by \$648,450, which would likely result in a decrease of four administrative law judges and two support staff positions.

- Safety, however, will not realize a significant decrease in expenditures. Safety will still prosecute forfeiture matters, but the \$648,450 will be paid to various courts across the state rather than to Administrative Procedures.

CERTIFICATION:

The information contained herein is true and correct to the best of my knowledge.

A handwritten signature in blue ink that reads "Krista M. Lee". The signature is written in a cursive, flowing style.

Krista M. Lee, Executive Director

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